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Supreme Court, U.S.
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No. 94-255

In The

Supreme Court of the United States

October Term, 1994

JEAN COLLINS, an individual, and TERRY COLLINS, her husband,

Petitioners,

vs.

GREENE COUNTY MEMORIAL HOSPITAL, a corporation; and ARUNAVA DAS, M.D.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court of the United States has jurisdiction to review the Supreme Court of Pennsylvania's interpretation and application of a state procedural statute governing the transfer of state law claims from federal to state court upon dismissal by the federal court for lack of subject matter jurisdiction.

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Appendix B — Petition for Allowance of Appeal in the Supreme Court of Pensylvania, Western Division 9a

Appendix C — Brief for Appellants in the Supreme Court of Pennsylvania, Western District 21a

STATEMENT OF JURISDICTION

Respondent Greene County Memorial Hospital (hereinafter "the Hospital" or "Respondent") contends that this case involves purely an issue of state law; specifically, the interpretation of a Pennsylvania statute allowing for the transfer to state court of actions dismissed from the federal district courts in Pennsylvania for lack of subject matter jurisdiction. The case raises no federal constitutional or statutory issues. As a result, the Supreme Court of the United States lacks jurisdiction to review the decision of the Supreme Court of Pennsylvania in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

The Hospital contends there are no provisions of the United States Constitution at issue.

COUNTER-STATEMENT OF THE CASE

Jean and Terry Collins (hereinafter "the Collins" or "Petitioners") originally filed this action in the United States District Court for the Western District of Pennsylvania on April 29, 1988. (*Jean Collins, et ux. v. Arunava Das, M.D. and Greene County Memorial Hosp.*, C.A. 88-967). The federal complaint alleged that Jean Collins was sexually assaulted by Dr. Arunava Das at the Hospital on October 8, 1986. At the time of the alleged incident, Jean Collins was an employee of the Hospital and Dr. Das was a physician with staff privileges. The complaint asserted a cause of action against the Hospital under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (hereinafter "Title VII"), and common law claims of negligence and intentional infliction of emotional distress.

On July 18, 1990, the Hospital filed and served upon the Collins an Offer of Judgment pursuant to Fed. R. Civ. P. 68. The

Hospital consented to the entry of certain injunctive relief requiring the promulgation and publication of a policy explicitly prohibiting sexual harassment in the workplace and agreed to the payment of $5,000 to Jean Collins to compensate her for any wage loss incurred as a result of the October 8, 1986, incident. The Rule 68 Offer of Judgment was accepted by Petitioners by letter dated August 9, 1990.

On August 17, 1990, the Honorable Gustave Diamond, Judge of the United States District Court for the Western District of Pennsylvania, entered an Order of Judgment and Final Decree which incorporated the terms of the Rule 68 Offer. On August 23, 1990, Judge Diamond entered an Order dismissing the Collins' remaining pendent state law claims for lack of subject matter jurisdiction. In his opinion, Judge Diamond noted, "the plaintiffs will not suffer the prejudice of having a statute of limitations problem in light of 42 Pa. Cons. Stat. Ann. § 5103(b), which will permit them to pursue the claims asserted here in the courts of the Commonwealth." (A.28-29)[1]

Plaintiffs did not appeal the order dismissing their pendent state law claims. They then took no steps to otherwise pursue their state law claims until March 19, 1991, nearly seven months later, when they filed a Praecipe to Transfer in the Court of Common Pleas of Greene County pursuant to 42 Pa. Cons. Stat. Ann. § 5103(b), which provides in pertinent part:

> § 5103 Transfer of erroneously filed matters
>
> (a) General rule. — If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth

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1. References to the Appendix to the Collins' Petition for Writ of Certiorari are designated as "(A.__)."

which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth. A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal.

(b) Federal cases. —

(1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth. In order to preserve a claim under Chapter 55 (relating to limitations of time), a litigant who timely commences an action or proceeding in any United States court for a district embracing any part of this Commonwealth is not required to commence a protective action in a court

> or before a district justice of this Commonwealth. Where a matter is filed in any United States court for a district embracing any part of this Commonwealth and the matter is dismissed by the United States court for lack of jurisdiction, any litigant in the matter filed may transfer the matter to a court or magisterial district of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).
>
> (2) Except as otherwise prescribed by general rules, or by order of the United States court, such transfer may be effected by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court or magisterial district of this Commonwealth . . . .

The Hospital filed Preliminary Objections seeking dismissal of the Collins' transfer as untimely in light of the Superior Court of Pennsylvania's decision in *Williams v. F.L. Smithe Mach. Co.*, 395 Pa. Super. 511, 577 A.2d 907 (1990), *alloc. denied*, 593 A.2d 418 (Pa. 1991), in which the court held that in order to protect the timeliness of the initial filing in federal court a plaintiff must *promptly* comply with the provisions of § 5103(b). On June 7, 1991, the Honorable H. Terry Grimes, President Judge of the Court of Common Pleas of Greene County, Pennsylvania, sustained the Hospital's Preliminary Objections and dismissed the Praecipe to Transfer as untimely. Petitioners thereafter appealed to the Superior Court of Pennsylvania.

On November 2, 1992, the Superior Court affirmed the dismissal of the Collins' Praecipe to Transfer on the grounds that it was untimely filed. The court's opinion was published at 419 Pa. Super. 519, 615 A.2d 760 (1992). The Collins then petitioned to the Supreme Court of Pennsylvania for review, which was granted on August 10, 1993. On April 13, 1994, following oral argument and extensive briefing on both sides, the Pennsylvania Supreme Court affirmed, per curiam, without opinion, the decision of the Superior Court of Pennsylvania. One justice dissented. The per curiam order of affirmance and the dissenting opinion were published at __ Pa. __, 640 A.2d 379 (1994). The Collins requested reargument which was denied by the state Supreme Court on May 11, 1994.

The Collins then filed their Petition for Writ of Certiorari (hereinafter "Petition") in this Court.

SUMMARY OF THE ARGUMENT

The Supreme Court of the United States does not have jurisdiction under 28 U.S.C. § 1257 over this case for two reasons: first, there is no substantial federal question, and second, no federal question was properly "pressed and passed upon" by the Pennsylvania courts.

There is no substantial federal question because this case involves the interpretation and application by the Pennsylvania courts of a state procedural statute. The statute at issue allows for the transfer to state court of actions dismissed from federal district courts in Pennsylvania for lack of subject matter jurisdiction. If an action is properly transferred, the date of the initial filing in federal court will be treated as the date of commencement of the action for purposes of the statute of limitations. This case simply does not raise a substantial federal issue.

Although Petitioners claim that they have been deprived of a jury trial under the Seventh Amendment, this amendment has not been incorporated into the Fourteenth Amendment and thus is not applicable to the states. Petitioners also claim that they have been deprived of their right to due process of law under the Fifth and Fourteenth Amendments, but this is simply an attempt to transform an issue of state law into a "constitutional question." State courts are the ultimate expositors of state law, and purely state law decisions cannot be overturned, or even reviewed, by this Court.

Further, this Court does not have jurisdiction over this case because no federal question was properly pressed and passed upon in the Pennsylvania courts. The only statement of any federal constitutional issue by the Collins was made in their brief to the Pennsylvania Supreme Court in which they claimed "it was simply unfair and thus a violation of both federal and state due process to retroactively apply promptness without providing a grace period for then existing claims dismissed from federal court for lack of subject matter jurisdiction." This passing reference to "due process" is insufficient to preserve a constitutional issue for review by this Court.

Finally, even if this Court would determine that it had jurisdiction over this case, the decisions of the Pennsylvania Superior and Supreme Courts were proper and thus do not justify review.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION, AND THE UNITED STATES SUPREME COURT THUS LACKS JURISDICTION TO REVIEW THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA.

This Court's certiorari jurisdiction over decisions from state courts is derived from 28 U.S.C. § 1257, which provides in pertinent part as follows:

> § 1257. State courts; certiorari
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or law of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (1993). This Honorable Court should not grant certiorari because this case simply does not present a "federal question" within the meaning of § 1257.

The case of *Millingar v. Hartupee*, 73 U.S. (6 Wall.) 258 (1867), is viewed as the first statement of the doctrine that a substantial federal question is a prerequisite of this Court's jurisdiction in appeals from state courts. Ulman and Spears, *"Dismissed for Want of a Substantial Federal Question"*, 20 B.U.L. Rev. 501, 507 (1940). In *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 87 (1891), this Court expounded upon the principle set out in *Millingar*, noting that "the bare averment of a federal question is not in all cases sufficient .... [there] must be at least a colorable ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."

In *Zucht v. King*, 260 U.S. 174 (1922), certain ordinances requiring vaccination of children who attended public schools were challenged on the grounds that they violated the due process and equal protection clauses of the Fourteenth Amendment. Although this Court noted that "[t]he validity of the ordinances under the Federal Constitution was drawn in question by objections properly taken below," it dismissed the appeal, stating "it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not ... substantial in character." *Id.* at 176 (citation omitted).

The federal questions alluded to in the Petition for Writ of Certiorari are not substantial. The Collins baldly assert that they have been deprived of their right to a jury trial under the Seventh Amendment without elaboration or citation to authority. The failure to cite to controlling authority is explained by the fact that the right to a civil jury trial encompassed in the Seventh Amendment is not incorporated into the Fourteenth Amendment and thus not applicable to the states. "The Seventh Amendment 'applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in

state courts . . . .' " *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1488 n. 16 (5th Cir.), *cert. denied*, 113 S. Ct. 467 (1992), *citing, Minneapolis and St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916).

The Collins also claim they have been deprived of their right to due process of law under both the Fifth and Fourteenth Amendments to the United States Constitution. This claim is similarly enigmatic as the Collins simply state in conclusory fashion that the state Supreme Court's failure to embrace their proffered statutory interpretations constitutes "a violation of due process." Such a transparent attempt to create a federal jurisdiction where none exists must fail. This Court has repeatedly held that state courts are the ultimate expositors of state law, and that it will be bound by their construction, except in extreme circumstances, such as where the state court interpretation of state law is an obvious subterfuge to evade consideration of a controlling federal issue. *Mullaney v. Wilbur*, 421 U.S. 684, 691 and n. 1 (1975).

In *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 163 (1916), this Court roundly rejected an attempt to turn issues of state law into "constitutional questions." As do the Petitioners here, the petitioner in *Enterprise* asserted that the Nebraska Supreme Court's interpretation of certain issues of state law violated its due process and equal protection rights. In rejecting this argument, this Court stated:

> The claim that the court, in disposing of some of the questions, including that of the estoppel, misconceived or misapplied the statutory and common law of the state, and thereby infringed the due process and equal protection clauses of the Fourteenth Amendment, requires but brief notice. *The due process clause does not take up the laws of the several states and make all*

> *questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law* . . . . The questions presented . . . all turned exclusively upon the law of the state, and the state court's decision of them is controlling . . . [Such a] judgment is . . . not open to review by this court.

Id. at 165-66 (emphasis added, citations omitted).

In the case at bar, the Collins argue that the Pennsylvania Supreme Court's affirmance of the lower court's dismissal of their *state law claims* as untimely transferred pursuant to a *state procedural statute* "violates due process." It is beyond peradventure that the interpretation of state procedural statutes is a matter for the highest court of the state and not a matter for review in this Court. This Court should thus deny the Collins' Petition for Writ of Certiorari.

II.

ANY FEDERAL QUESTIONS RAISED IN THE COLLINS' PETITION FOR WRIT OF CERTIORARI WERE NOT "PRESSED OR PASSED UPON" BY THE PENNSYLVANIA COURTS, AND THEREFORE, THE UNITED STATES SUPREME COURT SHOULD NOT, FOR BOTH JURISDICTIONAL AND PRUDENTIAL REASONS, GRANT CERTIORARI.

This Court has been frequently called upon to interpret its jurisdiction under 28 U.S.C. § 1257, which was derived from § 25 of the Judiciary Act of 1789, and its predecessors, and has held that it does not have jurisdiction unless a federal question has been raised and decided in the state court below. *Crowell v. Randell,* 35

U.S. (10 Pet.) 368 (1836). "If both of these do not appear on the record, the appellate jurisdiction fails." *Id.* at 392.[2] This rule, which became known as the "not pressed or passed upon below" rule, was expounded upon in *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940), in which this Court observed:

> [I]t is also the settled practice of this court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below . . . . In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these

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2. Although the rule of *Crowell v. Randell* literally required that the federal claim be *both* raised and addressed in state court, later decisions have required only that the federal claim be *either* raised or considered and resolved by the state court. *Illinois v. Gates*, 462 U.S. 213, 218, n. 1 (1983), *citing*, *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35(1940).

> reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.

(Citations omitted). *See also, State Farm Mut. Auto. Ins. Co. v. Duel,* 324 U.S. 154, 160 (1944). In *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969), this Court explained the rationale underpinning this rule:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, . . . they should be given the first opportunity to consider them.

Id. at 439 (citation omitted).

The "not pressed or passed upon below" rule has been frequently and consistently applied by this Court to preclude review of proffered constitutional issues that the litigants have failed to properly preserve in the state courts. *See Monks v. New Jersey,* 398 U.S. 71 (1970); *Hill v. California,* 401 U.S. 797, 805-06 (1971); *Tacon v. Arizona,* 410 U.S. 351, 352 (1973); *Fuller v. Oregon,* 417 U.S. 40, 50, n. 11 (1974); *Webb v. Webb,* 451 U.S. 493,

495 (1981); *Illinois v. Gates*, 462 U.S. 213, 222 (1983); and *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76 (1988). *But see, Terminiello v. Chicago*, 337 U.S. 1, 8 (1949) (Frankfurter, J., dissenting) ("For the first time in the course of the 130 years in which State prosecutions have come here for review, this Court is today reversing a sentence imposed by a State court on a ground that was urged neither here nor below. . . ."); *Vachon v. New Hampshire*, 414 U.S. 478, 483-84 (1974) (Rehnquist, J., dissenting) ("Since the Supreme Court of New Hampshire was not presented with a federal constitutional challenge to the sufficiency of the [challenged] evidence, resolution of this question by the Court is inconsistent with the Congressional limitation on our jurisdiction to review the final judgment of the highest court of a State").

This Court has stated that there are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. "Although no particular form of words or phrases is essential, the claim of invalidity and the ground therefore must be brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). The Collins simply did not bring any federal issue "to the attention of the state court with fair precision and in due time." A review of the statement of issues and summaries of argument of the briefs filed by the Collins in the Pennsylvania courts shows they presented no federal constitutional questions at any stage of the state court proceedings. *See* Appendix attached hereto which contains the pertinent sections of the Collins' brief in the Pennsylvania Superior Court (1a-8a)[3]; Petition for Allowance of Appeal to the Pennsylvania Supreme Court (9a-20a); and brief in the Pennsylvania Supreme Court (21a-28a). In the text of their briefs,

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3. References to the Appendix to the Hospital's Brief in Opposition are designated as "(__a)."

the only reference to the federal principle of due process is made, in passing, in their brief before the Pennsylvania Supreme Court, in which they baldly conclude that "it was simply unfair and, thus, a violation of both federal and state due process to retroactively apply promptness without providing a grace period for then existing claims dismissed from federal court for lack of subject matter jurisdiction." (27a) (citations omitted). This passing reference to "due process" is insufficient, for several reasons, to constitute a proper and timely presentation of this issue to the Pennsylvania courts.

The proper method for raising a federal question is dependent upon the particular state practice. *See Pennsylvania R.R. Co. v. Illinois Brick Co.*, 297 U.S. 447 (1936). Rule 1115(a)(3) of the Pennsylvania Rules of Appellate Procedure governs the content of a Petition for Allowance of Appeal to the Pennsylvania Supreme Court and provides in pertinent part that "[o]nly the questions set forth in the petition, or fairly comprised therein, will ordinarily be considered by the court in the event that an appeal is allowed." The sole issue presented by the Collins' Petition for Allowance of Appeal to the Pennsylvania Supreme Court was:

> Where state pendent claims are transferred from federal court to a Pennsylvania state court pursuant to 42 Pa. C.S.A. sec. 5103, may the lower courts construe the statute as requiring "promptness" and in so doing shall the transfer be stricken for untimeliness when the transfer is accomplished within seven months when the term 'prompt' is neither contained in the statute nor the time within which the transfer must be accomplished under such term is defined or provided by those courts.

(12a-13a). Thus phrased, this issue simply does not implicate the

Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Furthermore, Pa. R. App. P. 2216, which sets forth the requirements of the contents of a brief before the Pennsylvania Supreme Court, provides in relevant part that "no point will be considered [by the Pennsylvania Supreme Court] which is not set forth in the statement of questions involved or suggested thereby." The issues presented in the Collins' Brief in the Pennsylvania Supreme Court are as follows:

> Whether the timeliness of a transfer of pendant state claims transferred pursuant to § 5103(b) is based on principles of non pros or is based on the word "prompt" as supplied and understood by the Court of Common Pleas and affirmed by the Superior Court as a term used in construing 42 Pa. C.S.A. § 5103?
>
> Below, both the Court of Common Pleas and the Superior Court considered promptness to be a requirement in effecting a transfer pursuant to § 5103. Neither court addressed the question of the propriety of a non-pros petition for attacking delay in effecting a § 5103 transfer.

(23a). Again, these statements simply do not implicate federal due process issues.

The Collins' passing reference to "due process" in the body of their brief is similarly insufficient to preserve any federal constitutional issue for review by this Court. In *Webb v. Webb*, 451 U.S. at 501, this Court stated that:

> [a]t the minimum, . . . there should be no doubt from the record that a claim under *a federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

The *Webb* Court determined that "[a]lthough petitioner did use the phrase 'full faith and credit' at several points in the proceedings below, nowhere did she cite to the Federal Constitution or any cases relying on the Full Faith and Credit Clause of the Federal Constitution." *Id.* at 496. Because the petitioner failed to raise her federal claim in the state proceedings and the Georgia Supreme Court thus failed to rule on any federal issue, the court concluded that it was without jurisdiction in the case and dismissed the writ for want of jurisdiction. *Id.* at 501-02. *See also, Bowe v. Scott*, 233 U.S. 658, 664-65 (1914) (reference to "due process of law" "affords no basis whatever for invoking the jurisdiction of this court"). Thus, the words "due process," without more, are inadequate to preserve any federal constitutional issue for review by this Court.

Moreover, the Collins have simply failed to meet their burden to establish that this Court has jurisdiction. It is the *petitioner* who bears the burden of establishing the Supreme Court's jurisdiction. *Durley v. Mayo*, 351 U.S. 277, 285 (1956). This Court's Rule 14(h) mandates in pertinent part:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner

> of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Sup. Ct. R. 14(h). In their Petition, the Collins do little more than summarily contend that the constitutional issues have been raised, preserved and ruled upon by the Pennsylvania courts. *See* Petition at 2-3. However, the Collins do not indicate, either in the text of their Petition or by citation to the record, the stage of the proceedings at which their constitutional claims were raised, the method by which these claims were raised, or the way in which they were passed upon by the courts below.[4] The Petition thus does not comply with the requirements of Rule 14(h) and Petitioners have failed to meet their burden of establishing this Court's jurisdiction.

In sum, under the rule of *Crowell v. Randell* and its progeny, this Court, for both jurisdictional and prudential reasons, should decline to consider the federal questions presented in the Collins' Petition for Writ of Certiorari as they were not "pressed or passed upon" by the Pennsylvania courts.

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4. It is noteworthy that none of the Pennsylvania courts' opinions refer to any constitutional claim or argument. (*See* A.1-26) When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969).

III.

THE DECISIONS OF THE PENNSYLVANIA SUPERIOR AND SUPREME COURTS WERE PROPER AND DO NOT JUSTIFY REVIEW BY THE UNITED STATES SUPREME COURT.

Petitioners argue that this case "cries out for justice" because the Pennsylvania Superior and Supreme Courts did not agree with their interpretation of §§ 5103 and 5535 of Title 42 of Pennsylvania's Consolidated Statutes Annotated. Petition at 15. The Collins argue that reading these two sections together inexorably leads to the conclusion that they had one year to transfer their action from federal to state court. However, the plain language of §§ 5103 and 5535 indicates that the two provisions are independent of each other and apply to distinctly different situations. Title 42 Pa. Cons. Stat. Ann. § 5535, by its express terms, applies to the *commencement* of a *new action* following the termination of a prior *matter* based on the same *cause of action,* whereas 42 Pa. Cons. Stat. Ann. § 5103 applies only to the *transfer of matters* filed in the wrong court. Section 5103(b) is even narrower in its scope, applying only to actions dismissed from federal court for lack of subject matter jurisdiction. As will be shown, *infra,* the specific terms utilized in each section are significant when analyzing the application of the respective provisions.

Section 5535 provides in pertinent part:

> § 5535 *Effect of other actions and proceedings*
>
> (a) Termination of prior matter. —
>
> (1) If a civil action or proceeding is timely commenced and is terminated, a party, or his

> successor in interest, may, notwithstanding any other provision of this subchapter, commence a *new action* or *proceeding* upon the same *cause of action* within one year after the termination and any other party may interpose any defense or claim which might have been interposed in the original action or proceeding.
>
> (2) Paragraph (1) does not apply to:
>
> (i) An action to recover damages for injury to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.
>
> (ii) An action or proceeding terminated by a voluntary non-suit, a discontinuance, a dismissal for neglect to prosecute the action or proceeding, or a final judgment upon the merits.

42 Pa. Cons. Stat. Ann. § 5535(a) (emphasis added). This provision permits a litigant one year to *commence a new action* if the original proceeding on the same cause of action is terminated, so long as the initial action is not a personal injury action, terminated by voluntary non-suit, dismissed for failure to prosecute or decided on the merits.

Each of the essential terms of the statute — "matter," "action" and "cause of action" — have distinct meanings which are important to the interpretation of this section and its comparison to § 5103(b). A "matter" is defined in 42 Pa. Cons. Stat. Ann. § 102 as an "action, proceeding or appeal." An "action" is defined by the same section as "any action at law or in equity." Thus, the

definitional section of Title 42 makes clear that the terms "action" and "matter" refer to a legal proceeding or lawsuit pending before a court. On the other hand, the term "cause of action" is defined in *Black's Law Dictionary* as "the fact or facts which give a person a right to judicial relief," as distinct from a theory of recovery or legal action upon which relief is sought. Section 5535, therefore, contemplates the commencement of a new legal proceeding based upon the same cause of action, but not necessarily the same legal theory or claim for relief.

For instance, § 5535 applies where a party has timely filed an action but has failed to meet the technical pleading requirements of the chosen theory of recovery. Where, after dismissal at the pleadings stage and upon further investigation, the plaintiff discovers facts which support recovery on the same cause of action (the facts giving rise to the claim), but under a different legal theory of recovery, § 5535 allows one year to file a new action on the same cause of action. The prohibition of § 5535(a)(2)(ii) against refiling actions that have been voluntarily non-suited, discontinued or determined on the merits leaves only the dismissal for "technical" failures at the pleadings stage; *e.g.*, improper service, failure to include a necessary party and the other grounds set forth in Pa. R. Civ. P. 1028 for Preliminary Objections. Because dismissal on these grounds is not "a determination on the merits," § 5535 gives a plaintiff additional time to investigate her claim and cure the defects that led to the dismissal of her first effort. The rationale behind this provision is apparent. If a plaintiff has timely filed her claim, the defendant is on notice of the lawsuit and the facts upon which it is based. Allowing an additional year to cure any defects in the original complaint does not seriously disadvantage or inconvenience the defendant because the dismissal will necessarily have come at the initial stages of the lawsuit. On the other hand, if the plaintiff has a valid cause of action, dismissal without recourse should additional necessary evidence come to light within one year would be unreasonably harsh.

Section 5103, by contrast, governs only the *transfer of matters* which have been erroneously filed in the wrong court. That section provides:

> § 5103 *Transfer of erroneously filed matters*
>
> (a) General rule. — If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth. A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal.
>
> (b) Federal cases. —
>
> (1) Subsection (a) shall also apply to any *matter* transferred or remanded by any United States court for a district

embracing any part of this Commonwealth. In order to preserve a claim under Chapter 55 (relating to limitations of time), a litigant who timely commences an *action* or *proceeding* in any United States court for a district embracing any part of this Commonwealth is not required to commence a protective action in a court or before a district justice of this Commonwealth. Where a *matter is* filed in any United States court for a district embracing any part of this Commonwealth and the *matter* is dismissed by the United States court for lack of jurisdiction, any litigant in the *matter* filed may transfer the *matter* to a court or magisterial district of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).

(2) Except as otherwise prescribed by general rules, or by order of the United States court, such transfer may be effected by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court or magisterial district of this Commonwealth. *The pleadings shall have the same effect as under the practice in the United States court,* but the transferee court or district justice may require that they be amended to conform to the practice in

> this Commonwealth. Section 5535(a)(2)(i) (relating to termination of prior matter) shall not be applicable to a matter transferred under this subsection.

42 Pa. Cons. Stat. Ann. § 5103 (emphasis added).

Section 5103(b) permits a litigant to transfer a *matter* that has been dismissed by a federal court for lack of subject matter jurisdiction to the appropriate state court. Nowhere does § 5103(a) or § 5103(b) speak of filing a new matter based on the same cause of action, and it is clear from the language of § 5103(b)(2) that the original pleadings in federal court define the scope of the action once transferred. In other words, a plaintiff could not transfer an action after the expiration of the statute of limitations and then attempt to amend his complaint to add new theories of recovery not plead in the original federal complaint. Section 5103 is intended only to place the action in the right forum and to protect a plaintiff from the bar of the statute of limitations if the original action was timely filed, albeit in the wrong court. It does not allow the plaintiff to file a new action with claims and theories of recovery different from those set forth in the complaint. Furthermore, unlike § 5535 where the action is dismissed at the pleading stage, actions transferred pursuant to § 5103(b) can be dismissed from federal court at any stage of the proceedings once the court determines it lacks subject matter jurisdiction, which it can do, sua sponte, at any time. Fed. R. Civ. P. 12(h)(3). In this case, for instance, the dismissal came more than two years after the initial filing.

The language of § 5535 and § 5103 with respect to how the action is reinstated is also significant. Section 5535 speaks of the *commencement* of a new action, whereas § 5103(b) refers to the *transfer* of an existing action. Nowhere in the language of § 5535 does the word "transfer" appear. Rather, the words "termination,"

"terminate" and "commence" appear repeatedly throughout the statute. *See* 42 Pa. Cons. Stat. Ann. § 5535(b)-(c). The phrase "commencement of a new action" describes the initiation of a new proceeding by the filing and service of initial process. Section 5103, however, is entitled "Transfer of erroneously filed matters" and pertains to the transfer of cases without the necessity of service of original process. Therefore, the two provisions pertain to two very different situations.

Furthermore, the time period contained in § 5535 has a clear purpose. The one-year period provides a litigant sufficient time to further investigate her cause of action and then refile or recommence a new action with the benefit of any additional evidence. By contrast, the transfer of an action under § 5103 requires no investigation or even the preparation of new pleadings. This omission of an express time limitation for effecting a transfer pursuant to § 5103 is explained by the fact that up until the 1982 amendments to that section, it was contemplated that the action necessary to transfer the matter would be taken by the court, not the litigants, thus negating the need for any time limitation. The timing of the enactment of the amendments to §§ 5103(b) and 5535 makes it unlikely that the Legislature intended to include transfers under § 5103 within the savings provisions of § 5535. Furthermore, practical considerations make it even less likely. Why would the Legislature provide a litigant one year to transfer the claims under § 5103(b), when all the Legislature requires the litigant do is obtain and file certified copies of the federal docket and pleadings? It is inconceivable that the Legislature could have expected that such a task would require up to one year to complete.

The legislative history of §§ 5103 and 5535, particularly the dates of enactment and amendment of the provisions, further supports the conclusion that these provisions are independent and apply to distinctly different situations. Section 5535 was introduced as P.L. 586, No. 142, § 2 on July 9, 1976 and became

effective on June 27, 1978. Although Pennsylvania has had a statute governing the transfer of actions erroneously filed in the wrong court since 1933, the modification to § 5103(b) that required the litigants, not the federal court, to transfer claims to state court was made in 1982. Section 5103(b) was amended by the Act of December 20, 1982, P.L. 1409, No. 326, Art. II, § 201, effective February 18, 1983, seemingly in response to Judge Sloviter's *dubitante* opinion in *Weaver v. Marine Bank,* 683 F.2d 744 (3d Cir. 1982), in which she questioned a federal district court's power to transfer pendent state law claims on the basis of a state statute. The 1982 amendment to § 5103(b) made two significant changes. First, it referred to cases "dismissed" by a federal court, and second, it spoke in terms of the "litigants," rather than the court, taking the steps necessary to transfer the claim. 42 Pa. Cons. Stat. Ann. § 5103(b) (1982). In sum, with the 1982 amendment, § 5103(b) now spoke of the federal court *dismissing* pendent claims and the *litigant* transferring the claims *after their dismissal.* With these changes, the need for a time period during which the litigant must act arose for the first time.

Therefore, because § 5535 was enacted approximately five years before the amendment to § 5103(b) which created the need for a time limit under which a transfer must be effected, the Legislature could not have intended at the time § 5535 was enacted that the one-year period provided therein would apply to the transfer of claims under § 5103(b). Further, had the Legislature intended that § 5535's one-year provision apply to the newly modified version of § 5103(b), it surely would have amended § 5535 in 1982 to so indicate.

The Legislature would have also cross-referenced the general time provision of § 5535 if it intended that clause to apply to the transfer of claims under § 5103(b), rather than making reference only to the exclusion set forth in § 5535(a)(2)(i). The argument that, by negative implication, § 5103(b)(2) renders the one-year

limitation period of § 5535 applicable to all claims transferred pursuant to § 5103(b)(1)-(2) is overly simplistic. The reference in § 5103(b)(2) is as follows: "Section 5535(a)(2)(i) (relating to termination of prior matter) shall not be applicable to a matter transferred under this subsection." 42 Pa. Cons. Stat. Ann. § 5103(b)(2). This provision simply makes clear that, notwithstanding the prohibition against filing a *new* personal injury action, personal injury claims may be *transferred* to state court pursuant to § 5103(b) following their dismissal from federal court for lack of subject matter jurisdiction. In light of the absolutely minimum action required to transfer the matter, allowing one year to accomplish it would be highly incongruous.

In sum, both the plain language and legislative history of 42 Pa. Cons. Stat. Ann. §§ 5535 and 5103(b) make clear that the two provisions are independent of each other and apply to distinctly different situations, and the Pennsylvania state courts were correct in rejecting Petitioners' argument that they had one year to transfer their claims to state court upon their dismissal from federal court for lack of subject matter jurisdiction.

CONCLUSION

Respondent Greene County Memorial Hospital respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari filed by Petitioners Jean and Terry Collins.

Respectfully submitted,

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APPENDIX A — APPELLANTS' BRIEF IN THE SUPERIOR COURT OF PENNSYLVANIA, WESTERN DIVISION

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DIVISION

NO: 01251 PGH 91

JEAN COLLINS, an individual; and
TERRY COLLINS, her husband,

Appellants,

vs.

GREENE COUNTY MEMORIAL HOSPITAL, a Corporation; and ARUNAVA DAS, M.D.,

Appellees.

APPELLANTS' BRIEF

Appeal from an Order dated June 7, 1991 at
A.D. 186 of 1991 in the Court of Common Pleas
of Greene County, Pennsylvania, Civil Division

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Joseph J. Hinchliffe, Esquire

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* * *

Appendix A

STATEMENT OF JURISDICTION

This matter is on appeal from a final order of the Greene County Court of Common Pleas. Accordingly, this Honorable Court has jurisdiction pursuant to 42 Pa. Cons. Stat. Ann. 702 (Purdon's 1990).

ORDER IN QUESTION

AND NOW, this 7th day of June, 1991, it is ORDERED the preliminary objection of the defendants is sustained and the transfer of the action from Federal Court is stricken.

ATTEST: BY THE COURT:

/s/ Rich Rosendale
PROTHONOTARY

/s/ H. Terry Grimes
PRESIDENT JUDGE

STATEMENT OF THE QUESTION INVOLVED

WHETHER THE TIMELINESS OF A TRANSFER OF PENDANT STATE CLAIMS TRANSFERRED PURSUANT TO § 5103(b) IS BASED ON PRINCIPLES OF NON PROS OR AS A MATTER OF STATUTORY CONSTRUCTION AS BASED ON THE WORD "PROMPT" AS SUPPLIED AND UNDERSTOOD BY THE TRIAL COURT AS A TERM USED IN CONSTRUING 42 PA. C.S.A. § 5103.

STATEMENT OF THE CASE

On or about October 8, 1986, Plaintiff, Jean Collins, was sexually assaulted by Defendant, Dr. Das at the Greene County Memorial Hospital. On April 29, 1988, Plaintiffs, Jean and Terry

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Collins, timely filed this action in the United States District Court for the Western District of Pennsylvania, pleading causes of action against the Defendants under Title VII of the Civil Rights Act of 1964, 421 U.S.C., § 2000(e) (hereinafter "Title VII") and under Pennsylvania Common Law theories of negligence and intentional infliction of emotional distress.

On August 8, 1990, Plaintiffs accepted the Defendant hospital's Offer of Judgment pursuant to F.R.C.P. 68 in regard to Plaintiffs' Title VII claim against the Defendant hospital. On August 17, 1990, the District Court entered an Order of Judgment and Final Decree on Plaintiffs' Title VII claim and, on August 23, 1990 the Court entered a Memorandum Order dismissing Plaintiffs' remaining state law claims for lack of subject matter jurisdiction.

On March 19, 1991, Plaintiffs filed a Praecipe to Transfer Plaintiffs' state claims in the Court of Common Pleas of Greene County, pursuant to 42 Pa. C.S.A. § 5103(b). Thereafter, both the Defendant doctor and the Defendant hospital filed Preliminary Objections or, in the alternative, Motions for Summary Judgment in response to Plaintiffs' Praecipe to Transfer — the basis of both Defendants' objections being that the seven month delay in filing a Praecipe to Transfer rendered the said transfer of the Plaintiffs' claims untimely thereby depriving the court of jurisdiction.

On June 7, 1991, the Honorable H. Terry Grimes sustained the Defendants' Preliminary Objections on the ground that the Plaintiffs did not promptly file a Praecipe to Transfer as, according to the Court, is required by 42 Pa. C.S.A. § 5103(b).

Appendix A

SUMMARY OF THE ARGUMENT

By enacting 42 Pa. C.S.A. § 5103 the legislature recognized the practical effect of filing state claims in federal court was to substantially fulfill the purpose of the applicable statute of limitations, i.e. to put an individual on notice within a reasonable amount of time that claims are being made against him. The recognition by the legislature of the practical effect of timely filing state claims in federal court rightly elevates substance over form, by keeping viable claims dismissed from federal court which, a the time of dismissal, have become technically time barred under state law. Simply put, under § 5103 the legislature intended that an action is commenced for purposes of state law and the statute of limitations is tolled at the time a party files state claims in federal court. Accordingly, a litigant's transfer of federally dismissed claims to state court is merely a ministerial act.

The clear and unambiguous language of § 5103 determines the conclusions that an action is commenced and the statute of limitations effectively tolled once a party timely files state claims in federal court, and that a subsequent transfer of such claims pursuant to § 5103 is a ministerial act.

First, § 5103(b)(1) specifically provides that a litigant need not file a protective action in state court when he timely files state claims in federal court. Thus, for purposes of state law an action is commenced and the statute of limitations tolled at the time of filing in federal court regardless of whether the action is subsequently dismissed from federal court.

Secondly, § 5103 provides the procedural rationale for why dismissal from federal court *does not* affect a claim's status as commenced. Under § 5103(a) a state court must treat the

transferred claim as if originally filed on the date when the claim was first filed in federal court. Thus a trial court, under § 5103 has no discretion in determining if the statute of limitations bars plaintiff's transfer to state court claims timely filed but dismissed from federal court. Rather the court must treat the claim as if it were filed in state court on the date filed in federal court.

Third, once a claim is dismissed from federal court § 5103 provides that *any* litigant in the case may effect a transfer under § 5103. Where timeliness is a legislative requirement, remedies and/or substantive rights are affected, precisely because a specific party is charged with a particular requirement which includes the filing of an action within a particular time period. Subsection (b)(1) however, by unambiguously asserting that *any litigant* may effect the transfer recognizes, for the purposes of the statute, that the dismissal from federal court *has no effect on the status of the claim as being commenced;* thus no particular party is burdened with "recommencing" the action because the act of effecting a transfer is merely ministerial.

Lastly, and most importantly for purposes of this action, the ministerial nature of effecting a transfer pursuant to § 5103, is certainly provided by the conspicuous absence of a time requirement within which to effect a transfer under § 5103. Certainly it is an understatement to say that the legislature had the notion of timeliness in mind when drafting § 5103. However, by not imposing a time requirement and requiring only that any litigant effect a transfer by filing certified copies of the *federal pleadings,* the legislature fully intended the act of transfer under § 5103 to be ministerial. Had the legislature intended otherwise a time requirement certainly would have been included within § 5103.

Because a claim, technically time barred solely because of the date dismissed from federal court for lack of jurisdiction, remains commenced under the protection afforded by § 5103, the only means for a defendant to attack what he may consider inordinate delay in a plaintiff's transfer of his action to state court under § 5103, is a Petition for Non Pros. Non Pros is an equitable action afforded to a defendant when a Plaintiff fails to prosecute his action. However, delay itself is insufficient for a granting of Non Pros. The defendant, under the doctrine must also show that he has been prejudiced by a plaintiff's delay in prosecuting his action.

That Non Pros is the only means of attacking delay under § 5103 is compelled by the procedural effect of filing a certified copy of the pleadings in state court under § 5103: Once a litigant has effected a transfer by filing a certified copy of the proceedings in state court, the court *must treat* the matter "as if originally filed in the transferee tribunal on the date when the claim was filed in federal court."

In the case at bar, the defendants in this case have in no way been prejudiced by the plaintiffs' proper transfer of this case on March 19, 1990 pursuant to § 5103. Thus any Petition for Non Pros is certainly premature and has no merit.

Seizing upon dicta in the case of *Williams v. Smithe* — that in order to protect the timeliness of an action under § 5103 a litigant must promptly effect a transfer pursuant to § 5103 — Defendant contends that as a matter of law Plaintiffs' claim is time barred because not promptly transferred from federal to state court. However, as any review of *Williams* indicates the Defendant's position is simply untenable.

First, as dicta, the language in *Williams* is not law, it merely

reflects what this court perceives should occur in the prosecution of *any* claim.

Second, *Williams* specifically held that complying with the provisions of § 5103 seven months after dismissal from federal court did not render Plaintiffs' claim untimely despite the fact that the Plaintiffs' timely claim in federal court was technically time barred in state court. In the case at bar Plaintiffs also effected her transfer under § 5103 seven months after the dismissal. Certainly *Williams* is controlling and Plaintiffs' claim is not untimely on a matter of law.

Lastly the dicta in *Williams* provides no basis upon which to attack the timeliness of a transfer under § 5103. Did the court intend that the statute of limitations applies when a plaintiff fails to promptly affect a transfer, or did the court intend a "new" limitation requirement based on the uncertainty of the term "promptness", or did the court intend to raise the specter of the availability of a Non Pros petition should a plaintiff delay in effecting a transfer?

Given the protection afforded a plaintiff under § 5103, Plaintiffs submit that applying either of the first of these alternatives can only be done in contravention of the holding in *Williams* and in contravention of the clear and unambiguous language of § 5103 that: (1) a plaintiff need not file a protective action when filing state claims in federal court; (2) that the state court must treat the transferred claims as if filed on the date filed in federal court; and (3) that any litigant in the matter may effect a transfer (application of either of the first two alternatives places, de facto, the sole burden on the plaintiff to transfer his action under the statute).

Given *Williams* and the clear and unambiguous language of § 5103, the only means available to a defendant to attack delay in effecting a transfer is a Petition for Non Pros since the status of a claim dismissed from federal court remains commenced under § 5103.

Lastly, on the hearing of defendant's Preliminary Objections the trial court, without reference to any case law, held Plaintiffs' claim untimely as a matter of statutory construction. In reaching its holding the court, in error, assumed that § 5103 expressly requires that a plaintiff promptly transfer his action. In short, the court believed that the word prompt is literally used in the statute. However, any reading of § 5103 demonstrates the court's error because "prompt" is simply not found in the statute, nor can any such requirement be reasonably implied from the language.

It is a fundamental precept of statutory construction that a court cannot insert a word into a statute where the legislature has failed to supply it. *Worley v. Augustine,* 310 Pa. Super. 178, 456 A.2d 558, 561 (1983). This limitation applies both where it appears that the word or provision was intentionally omitted, and where the omission is the result of inadvertence or a failure of the legislature to foresee or contemplate the case in question. *Latella v. Unemployment Compensation Board of Review,* 74 Pa. Cmwlth. 14, 459 A.2d 464 (1983).

Given the trial court's error, together with the clear and unambiguous language of § 5103, Plaintiffs' claim was not untimely when transferred to state court on March 19, 1991. Moreover, for the reasons stated the proper basis for attacking delay when transferring an action pursuant to § 5103 is by a Non Pros petition.

APPENDIX B — PETITION FOR ALLOWANCE OF APPEAL IN THE SUPREME COURT OF PENNSYLVANIA, WESTERN DIVISION

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DIVISION

NO: 645 W.D. Alloc. 1992

JEAN COLLINS, an individual; and
TERRY COLLINS, her husband,

Petitioners,

vs.

GREENE COUNTY MEMORIAL HOSPITAL, a Corporation; and ARUNAVA DAS, M.D.,

Respondents.

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the Order of the Superior Court of Pennsylvania at No. 1251 Pittsburgh 1991, Entered on November 2, 1992, Affirming the Order of the Court of Common Pleas of Greene County, Pennsylvania, Civil Division, at A.D. No. 186 of 1991, Dated June 7th, 1991, Sustaining Preliminary Objections of Defendants and Striking the Transfer of the Action From Federal Court.

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* * *

Appendix B

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DIVISION

NO:

JEAN COLLINS, an individual; and
TERRY COLLINS, her husband,

Petitioners,

vs.

GREENE COUNTY MEMORIAL HOSPITAL, a Corporation; and ARUNAVA DAS, M.D.,

Respondents.

PETITION FOR ALLOWANCE OF APPEAL

The Petition of Jean Collins and Terry Collins respectfully prays your Honorable Court to grant an allowance of this Appeal and respectfully submit the following:

I. REFERENCE TO THE OPINIONS BELOW.

The Opinion of The Superior Court of Pennsylvania has not yet been reported; the Opinion of the Court of Common Pleas of Greene County is also unreported. Copies of both Opinions are attached hereto in the Appendices as required by Pa.R.A.P. 1115(1)(6).

II. TEXTS OF THE ORDERS IN QUESTIONS.

A. The Order in question entered in the Superior Court dated

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November 2, 1992, before Judges Del Sole, Johnson and Ford Elliott, provides as follows:

JEAN COLLINS, AN INDIVIDUAL
AND TERRY COLLINS, HER
HUSBAND

APPELLANTS

NO. 1251 PITTSBURGH 1991

V

GREENE COUNTY MEMORIAL
HOSPITAL, A CORPORATION
AND ARUNAVA DAS, MD

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of GREENE County be, and the same is hereby AFFIRMED. JUDGE JOHNSON FILES A DISSENTING OPINION.

BY THE COURT:

/s/ Eleanor R. Valecho
DEPUTY PROTHONOTARY

DATED: NOVEMBER 2, 1992

B. The Order in the Court of Common Pleas of Greene County, Pennsylvania, Civil Division, dated June 7, 1989, before H. Terry Grimes, President Judge, provides as follows:

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JEAN COLLINS, an individual;
and TERRY COLLINS, her husband,

Plaintiffs,

vs. A.D. No. 186 of 1991

GREENE COUNTY MEMORIAL
HOSPITAL, a corporation; and
ARUNAVA DAS, M.D.,

Defendants.

ORDER

AND NOW, this 7th day of June, 1991, it is ORDERED the preliminary objection of the defendants is sustained and the transfer of the action from Federal Court is stricken.

ATTEST: BY THE COURT:

/s/ Rich Rosendale
PROTHONOTARY

/s/ H. Terry Grimes
PRESIDENT JUDGE

III. QUESTION PRESENTED FOR REVIEW.

WHERE STATE PENDENT CLAIMS ARE TRANSFERRED FROM FEDERAL COURT TO A PENNSYLVANIA STATE COURT PURSUANT TO 42 Pa.C.S.A. SEC. 5103, MAY THE LOWER COURTS CONSTRUE THE STATUTE AS REQUIRING "PROMPTNESS" AND IN SO DOING SHALL THE TRANSFER BE STRICKEN FOR UNTIMELINESS WHEN THE TRANSFER IS

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ACCOMPLISHED WITHIN SEVEN MONTHS WHEN THE TERM "PROMPT" IS NEITHER CONTAINED IN THE STATUTE NOR THE TIME WITHIN WHICH THE TRANSFER MUST BE ACCOMPLISHED UNDER SUCH TERM IS DEFINED OR PROVIDED BY THOSE COURTS.

IV. STATEMENT OF THE CASE

On or about October 8, 1986, Plaintiff, Jean Collins, was allegedly sexually assaulted by Defendant, Dr. Das at the Greene County Memorial Hospital. On April 29, 1988, Plaintiffs, Jean and Terry Collins, timely filed this action in the United States District Court for the Western District of Pennsylvania, pleading causes of action against the Defendants under Title VII of the Civil Rights Act of 1964, 421 U.S.C., Sec. 2000(e) (hereinafter "Title VII") and under Pennsylvania Common Law theories of negligence and intentional infliction of emotional distress.

On August 8, 1990, Plaintiffs accepted the Defendant Hospital's Offer of Judgment pursuant to F.R.C.P. 68 in regard to Plaintiffs' Title VII claim against the Defendant Hospital. On August 17, 1990, the District Court entered an Order of Judgment and Final Decree on Plaintiffs' Title VII claim and, on August 23, 1990 the Court entered a Memorandum Order dismissing Plaintiffs' remaining state law claims for lack of subject matter jurisdiction. A copy of Judge Diamond's Order is attached hereto in the Appendices.

On March 19, 1991, Plaintiffs filed a Praecipe to Transfer Plaintiffs' state claims in the Court of Common Pleas of Greene County, pursuant to 42 Pa. C.S.A. Sec. 5103(b), a copy of which statute is attached hereto in the Appendices. Thereafter, both the Defendant doctor and the Defendant hospital filed Preliminary

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Objections or, in the alternative, Motions for Summary Judgment in response to Plaintiffs' Praecipe to Transfer — the basis of both Defendants' objections being that the seven month delay in filing a Praecipe to Transfer rendered the said transfer of the Plaintiffs' claims untimely, thereby depriving the court of jurisdiction.

By an Order dated June 7, 1991, the Honorable H. Terry Grimes sustained the Defendants' Preliminary Objections on the ground that the Plaintiffs' filing was not "prompt" as mandated by the transfer statute which was required as a matter of statutory construction.

Thereafter, Petitioners filed their Notice of Appeal to Judge Grimes' Opinion on June 6, 1991, to the Superior Court of Pennsylvania. After briefing and oral argument before that Court, it rendered its Decision and Order of November 2, 1992, in which it sustained the Order of the Lower Court, thus affirming the holding that 42 Pa.C.S.A. Sec. 5103(b) transfers must be "prompt", although the statute provides no such requirement, nor any time requirement at all, and that the nearly seven month period before the filing was not timely, and therefore, the transfer was stricken and Petitioners thus lost their rights to proceed in any Court to litigate their state causes of action.

Although the Lower Court made no reference to the case of *Williams v. F.L. Smithe Machine Company, Inc.*, 395 Pa.Super. 511, 577 A.2d 907 (1990), appeal denied 3/14/91 at 593 A.2d 422 (1991), of this Court, a copy of which is attached hereto in the Appendices, which required the word "prompt" be used in construing the statute, the Superior Court again relied on that case in affirming the Lower Court's decision that a nearly seven month period was not a timely transfer. Thus, the *Williams case, supra,* Petition for Allowance of Appeal was pending in this Honorable Court until five days before Petitioners' transferred the action.

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V. SUMMARY OF THE ARGUMENT

By enacting 42 Pa. C.S.A. Sec. 5103 the legislature recognized the practical effect of filing state claims in federal court was to substantially fulfill the purpose of the applicable statute of limitations, i.e. to put an individual on notice within a reasonable amount of time that claims are being made against him. The recognition by the legislature of the practical effect of timely filing state claims in federal court rightly elevates substance over form, by keeping viable claims dismissed from federal court which, at the time of dismissal, have become technically time barred under state law. Simply put, under Sec. 5103 the legislature intended that an action is commenced for purposes of state law and the statute of limitations is tolled at the time a party files state claims in federal court. Accordingly, a litigant's transfer of federally dismissed claims to state court is merely a ministerial act.

First, Sec. 5103(b)(1) specifically provides that a litigant need not file a protective action in state court when he timely files state claims in federal court. Thus, for purposes of state law an action is commenced and the statute of limitations tolled at the time of filing in federal court regardless of whether the action is subsequently dismissed from federal court.

Secondly, Sec. 5103 provides the procedural rationale for why dismissal from federal court *does not* affect a claim's status as commenced. Under Sec. 5103(a) a state court must treat the transferred claim as if originally filed on the date when the claim was first filed in federal court. Thus a trial court, under Sec. 5103 has no discretion in determining if the statute of limitations bars plaintiff's transfer to state court claims timely filed but dismissed from federal court. Rather the court must treat the claim as if it were filed in state court on the date filed in federal court.

Third, once a claim is dismissed from federal court Sec. 5103 provides that *any litigant* in the case may effect a transfer under Sec. 5103. Where timeliness is a legislative requirement, remedies and/or substantive rights are affected, particularly because a *specific party* is charged with a particular requirement which includes the filing of an action within a particular time period. Subsection (b)(1) however, by unambiguously asserting that *any litigant* may effect the transfer recognizes, for the purposes of the statute, that the dismissal from federal court *has no effect on the status of the claim as being commenced;* thus no particular party is burdened with "recommencing" the action because the act of effecting a transfer is merely ministerial.

Lastly, and most importantly for purposes of this action, the intendment of the ministerial nature of effecting a transfer pursuant to Sec. 5103, is certainly provided by the conspicuous absence of any time requirement within which to effect a transfer under Sec. 5103. By not imposing a time requirement and requiring only that *any litigant* effect a transfer by filing certified copies of the *federal pleadings,* the legislature fully intended the act of transfer under Sec. 5103 to be ministerial. Had the legislature intended otherwise a time requirement certainly would have been included within Sec. 5103.

Because a claim, technically time barred solely because of the date dismissed from federal court for lack of jurisdiction, remains commenced under the protection afforded by Sec. 5103, the only means for a defendant to attack what he may consider inordinate delay in a plaintiff's transfer of his action to state court under Sec. 5103, is a Petition for Non Pros and not a Preliminary Objection. Non Pros is an equitable action afforded to a defendant when a Plaintiff fails to prosecute his action. However, delay itself is insufficient for a granting of Non Pros. The defendant, under the

doctrine must also show that he has been prejudiced by a plaintiff's delay in prosecuting his action. In the case of *Penn Piping, Inc. v. Insurance Company of North America,* 382 Pa. 19, 603 A.2d 1006 (1992), this Honorable Court held, pursuant to its supervisory power over Pennsylvania Courts, that inaction in the case for more than two years *presumptively prejudiced* the defendant, but thus did not discard the prejudice requirement. However, the Superior Court in the case of *Klein v. Walton,* ___ Pa. Super. ___, 604 A.2d 1064 (1992), has perhaps misconstrued the holding of *Penn Piping,* by disregarding the term "presumptively prejudiced' by stating that the case holds that a showing of prejudice is no longer a requirement for dismissing a case on the basis for failure to prosecute. A copy of the *Penn Piping* case report is attached hereto in the Appendices.

That Non Pros is the only means of attacking delay under Sec. 5103 is compelled by the procedural effect of filing a certified copy of the pleadings in state court under Sec. 5103: Once a litigant has effected a transfer by filing a certified copy of the proceedings in state court, the court *must treat* the matter "as if originally filed in the transferee tribunal on the date when the claim was filed in federal court."

In the case at bar, the appellees have not demonstrated that they have been prejudiced by the plaintiffs' proper transfer of this case on March 19, 1991 pursuant to Sec. 5103 approximately seven months after the federal dismissal. Thus any Petition for Non Pros would certainly be premature and has no merit.

Seizing upon the dicta in the *Williams case, supra,* the Superior Court again stated in the present case that in order to protect the timeliness of an action under Sec. 5103 a litigant must "promptly" effect a transfer pursuant to Sec. 5103, and in this case, unlike the *Williams case, supra,* held that a near seven month

period before transfer was not timely and thus the transfer was invalid. Defendant contends that as a matter of law Plaintiffs' claim is time barred because not promptly transferred from federal to state court. However, as a close review of *Williams, supra,* indicates, the Defendant's position is untenable, as a seven month period in that case was held to be timely by the Superior Court.

First, as dicta, the language in *Williams* is not law, it merely reflects what the Superior court perceived should occur in the prosecution of *any* claim.

Second, *Williams, supra,* specifically held that complying with the provisions of Sec. 5103 seven months after dismissal from federal court did not render Plaintiffs' claim untimely despite the fact that the Plaintiffs' timely claim in federal court was technically time barred in state court. In the case at bar Plaintiffs also effected the transfer under Sec. 5103 seven months after the dismissal. Certainly *Williams* is controlling and Plaintiffs' claim is not untimely as a matter of prior controlling law.

Lastly, the dicta in *Williams* provides no basis upon which to attack the timeliness of a transfer under Sec. 5103. Did the Superior Court intend that the statute of limitations applies when a plaintiff fails to promptly affect a transfer, or did the court intend a "new" limitation requirement based on the uncertainty of the term "promptness", or did the court intend to raise the specter of the availability of a Non Pros petition should a plaintiff delay in effecting a transfer?

Given the protection afforded a plaintiff under Sec. 5103, Plaintiffs submit that applying either of the first of these alternatives can only be done in contravention of the holding in *Williams, supra,* and in contravention of the clear and

unambiguous language of Sec. 5103 that: (1) a plaintiff need not file a protective action when filing state claims in federal court; (2) that the state court must treat the transferred claims as if filed on the date filed in federal court; and (3) that *any litigant* in the matter may effect a transfer (application of either of the first two alternatives places, de facto, the sole burden on the plaintiff to transfer his action under the statute).

Given *Williams, supra,* and the clear and unambiguous language of Sec. 5103, the only means available to a defendant to attack delay in effecting a transfer is a Petition for Non Pros since the status of a claim dismissed from federal court remains commenced under Sec. 5103.

Lastly, on the hearing of defendant's Preliminary Objections the trial court, without reference to *Williams, supra,* held Plaintiffs' claim untimely as a matter of *statutory construction.* In reaching its holding the court, in error, assumed that Sec. 5103 expressly requires that a plaintiff "promptly" transfer his action. In short, the court believed that the word "prompt" is literally used in the statute. However, any reading of Sec. 5103 demonstrates the court's error because "prompt" is simply not found in the statute, but only in the Superior Court dicta in *Williams, supra,* nor can any such requirement be reasonably implied with certainty from the language and the context within which it is used.

It is a fundamental precept of statutory construction that a court cannot insert a word into a statute where the legislature has failed to supply it. *Worley v. Augustine*, 310 Pa. Super. 178, 456 A.2d 558, 561 (1983). This limitation applies both where it appears that the word or provision was intentionally omitted, and where the omission is the result of inadvertence or a failure of the legislature to foresee or contemplate the case in question. *Latella v.*

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Unemployment Compensation Board of Review, 74 Pa. Cmwlth. 14, 459 A.2d 464 (1983).

Given the trial court's error, together with the clear and unambiguous language of Sec. 5103, Plaintiffs' claim was not untimely when transferred to state court on March 19, 1991. Moreover, for the reasons stated the proper basis for attacking delay when transferring an action pursuant to Sec. 5103 is by a Non Pros petition.

* * *

APPENDIX C — BRIEF FOR APPELLANTS IN THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

SUPREME COURT OF PENNSYLVANIA
Western District

No. 45 W.D. APPEAL DOCKET 93

JEAN COLLINS, an individual;
and TERRY COLLINS, her husband,

Appellants,

v.

GREENE COUNTY MEMORIAL HOSPITAL, a Corporation; and, ARUNAVA DAS, M.D.

Appellees.

BRIEF FOR APPELLANTS

Appeal from the Order of the Superior Court of Pennsylvania at No. 1251 PGH 91 entered 11/2/92 which affirmed the Order of the Court of Common Pleas of Greene County, Civil Division, entered 6/9/91 at No. A.D. 186 of 1991

Louis M. Tarasi, Jr., Esquire
PA. I.D. #01042
David E. Johnson, Esquire
PA. I.D. #00697

TARASI & JOHNSON, P.C.
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* * *

STATEMENT OF JURISDICTION

This matter is on appeal from a final order of the Superior Court of Pennsylvania, Pittsburgh District. Accordingly, this Honorable Court has jurisdiction pursuant to 42 Pa. Cons. Stat. Ann. 724 (Purdon's 1990).

ORDER IN QUESTION

AND NOW, this 7th day of June, 1991, it is ORDERED the preliminary objection of the defendants is sustained and the transfer of the action from Federal Court is stricken.

ATTEST: BY THE COURT:

/s/ Rich Rosendale
PROTHONOTARY

/s/ H. Terry Grimes
PRESIDENT JUDGE

ORDER IN QUESTION

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of GREENE County be, and the same is hereby AFFIRMED. JUDGE JOHNSON FILES A DISSENTING OPINION.

BY THE COURT:

/S/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: NOVEMBER 2, 1992

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STATEMENT OF THE QUESTION INVOLVED

WHETHER THE TIMELINESS OF A TRANSFER OF PENDANT STATE CLAIMS TRANSFERRED PURSUANT TO § 5103(b) IS BASED ON PRINCIPLES OF NON PROS OR IS BASED ON THE WORD "PROMPT" AS SUPPLIED AND UNDERSTOOD BY THE COURT OF COMMON PLEAS AND AFFIRMED BY THE SUPERIOR COURT AS A TERM USED IN CONSTRUING 42 PA. C.S.A. § 5103?

BELOW, BOTH THE COURT OF COMMON PLEAS AND THE SUPERIOR COURT CONSIDERED PROMPTNESS TO BE A REQUIREMENT IN EFFECTING A TRANSFER PURSUANT TO § 5103. NEITHER COURT ADDRESSED THE QUESTION OF THE PROPRIETY OF A NON-PROS PETITION FOR ATTACKING DELAY IN EFFECTING A § 5103 TRANSFER.

STATEMENT OF THE CASE

On or about October 8, 1986, Appellant, Jean Collins, was sexually assaulted by Appellee, Dr. Das at the Greene County Memorial Hospital. On April 29, 1988, Appellants, Jean and Terry Collins, Jean's husband, timely filed this civil action in the United States District Court for the Western District of Pennsylvania, pleading causes of action against the Appellees under Title VII of the Civil Rights Act of 1964, 421 U.S.C., § 2000(e) (hereinafter "Title VII") and under Pennsylvania Common Law theories of negligence and intentional infliction of emotional distress. (R. at 23a).

On August 8, 1990, Appellants accepted the Appellee Hospital's Offer of Judgment pursuant to F.R.C.P. 68 in regard to Appellants' Title VII claim against the Appellee Hospital. On

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August 17, 1990, the District Court entered an Order of Judgment and Final Decree on Appellants' Title VII claim (R. at 41a) and, on August 23, 1990 the Court entered a Memorandum Order dismissing Appellants' remaining state law claims for lack of subject matter jurisdiction. (R. at 33a, *infra* at 82).

Approximately six and a half months later, on March 19, 1991, Appellants filed a Praecipe to File Certified Copy of Appellants' state claims and a certified copy of the federal pleadings in the Court of Common Pleas of Greene County, pursuant to 42 Pa.C.S.A. § 5103(b). (R. at 2a). Thereafter, both the Appellees filed Preliminary Objections or, in the alternative, Motions for Summary Judgment (R. at 4a, 7a) in response to Appellants' Praecipe to Transfer — the basis of both Appellees' objections being that the delay in filing a Praecipe to Transfer rendered the said transfer of the Appellants' claims untimely, thereby depriving the court of jurisdiction.

By an Order dated June 7, 1991, the Honorable H. Terry Grimes sustained the Appellees' Preliminary Objections on the ground that the Appellants' filing was not "prompt" as required by the "express language" of the transfer statute. (*Infra* at 53). However, the word "prompt" appears nowhere in the statute.

Thereafter, Appellants filed their Notice of Appeal of Judge Grimes' Order of June 7, 1991, to the Superior Court of Pennsylvania on the ground that § 5103 neither explicitly, nor implicitly requires promptness. After briefing and oral argument the Superior Court rendered its Decision and Order of November 2, 1992, in which it sustained the Order of the Court of Common Pleas, thus affirming the holding that 42 Pa.C.S.A. § 5103(b) transfers must be "prompt", although the statute provides no such requirement. (*Infra* at 57). Thereafter, Appellants timely appealed to this Honorable Court.

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SUMMARY OF THE ARGUMENT

1. 42 Pa.C.S.A. § 5503 provides the unconditional substantive right of commencing an action, and tolling the statute of limitations, by filing pendant state claims in federal court, regardless of the court (state or federal) in which such claims are ultimately litigated. § 5103 provides the unconditional substantive right of transferring federally dismissed pendant claims to state court. Thus, pursuant to the terms of § 5503, the Legislature intended to provide a shield from the bar of the statute of limitations for state claims filed in federal court which are subsequently dismissed for lack of subject matter jurisdiction.

2. At bar, the Superior Court, apparently unaware of the existence of § 5503, turned that shield into a sword for Appellees when it held that it is § 5103, the transfer statute, which "provides protection from the bar of the statue of limitations," and because Appellants did not effect a § 5103 transfer promptly, the Superior Court affirmed dismissal of Appellant claims.

3. In light of § 5503, the Superior Court incorrectly stated and applied the law. Thus, it is incumbent upon this Court to reverse the dismissal of Appellants state claims.

4. Because Appellants had properly commenced their claims and tolled the statute of limitations by filing in federal court pursuant to § 5503, any complaint Appellees have concerning the time it took to transfer Appellants claims to state court, pursuant to § 5103, should have been addressed in a petition for non-pros. As this Court held in *Lamp v. Heyman*, non-pros is the sole remedy for attacking delay in the absence of a properly enacted or adopted rule to the contrary.

5. Even if this Court considers Appellees preliminary objection as a petition for non-pros, it should be denied because Appellees have at no time argued or shown that they were prejudiced by Appellants' short delay in effecting a § 5103 transfer.

6. The word "prompt" appears nowhere in § 5103 nor can it be reasonably implied. Thus, because it is reversible error for a court to insert a word into a statute where the Legislature has not done so, it is incumbent upon this Court to reverse the courts below and allow Appellants to prosecute their claim.

7. In *Lamp v. Heyman,* this Court prospectively required a Plaintiff to promptly deliver a filed Writ of Summons to the sheriff for service of process. However, the Appellants in *Lamp,* and all similarly situated Plaintiffs, were given a ninety day grace period in which to comply with the new rule. The grace period provided in *Lamp* was consistent with that line of Pennsylvania cases which hold it violative of due process to not provide a grace period where a shortened statute of limitations is applied retroactively. The failure of the Superior Court to provide Appellants with a grace period to comply with the new promptness requirement was violative of due process and, thus, is reversible error.

8. The case at bar cannot be reasonably compared to *Lamp v. Heyman,* which the Superior Court relied on for affirming dismissal of Appellants' claim. Unlike *Lamp,* Appellees herein were at all times aware that they had been sued pursuant to rights protected by the Commonwealth.

9. To the extent that an analogy exists between *Lamp* and the case at bar it supports reversal of the court below. Just as Pa.R.C.P. 1007 was found in *Lamp* to be an unconditional right for

commencing an action, so to is 42 Pa.C.S.A. § 5503, which provides the same unconditional protection for state claims filed in federal court. Moreover, just as the court in *Lamp* found non-pros to be the sole means of attacking delay in the absence of a rule to the contrary, so too is non-pros the proper means of attacking any delay in the case at bar.

10. It is elementary that this Supreme Court has *exclusive* supervisory powers over the Courts of the Commonwealth and the procedures therein. Moreover, any act of a court which exceeds its jurisdiction or power is a nullity. Clearly, the Court of Common Pleas and the Superior Court acted outside of the parameters of their jurisdiction when they improperly exercised supervisory power by adding a promptness requirement to a § 5103 transfer. Thus, the promptness amendment imposed on the Appellants by the courts below is a nullity, requiring reversal of their dismissal of Appellants claims.

* * *

A. Under *Lamp v. Heyman*, it was error for the Superior Court not to provide a grace period for Appellants.

Even if it is assumed arguendo that the Superior Court did have the jurisdiction or power to require promptness in a § 5103 transfer, which Appellant vociferously denies, it was simply unfair and, thus, a violation of both federal and state due process to retroactively apply promptness without providing a grace period for then existing claims dismissed from federal court for lack of subject matter jurisdiction. *Lamp, supra, Byers, supra.*

Surely Appellee will, without merit, argue that below, the Superior Court relied on *Williams, supra,* wherein the Superior

Court in dictum first referred to "promptly effecting a § 5103 transfer". (*infra* at 30). Appellees' rationale is that because *Williams* was decided more than 90 days before Appellants were dismissed from federal court for lack of subject matter jurisdiction, the application of the "controlling dictum" in *Williams* to the case at bar was prospective and thus not violative of *Lamp*.

Appellants submit that dicta uttered by any court is not controlling:

> "... language in a judicial opinion going beyond the issues raised and not applicable to the particular facts of the case is obiter dictum. Such statements, being unnecessary for the decision, cannot be controlling in a subsequent action, for nothing can be stare decisis which was not actually considered and determined ...
>
> Nevertheless, principles announced by the ...

* * *